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In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

Petition for Writ of Certiorari and Brief in Support Thereof

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POPE & TALBOT, INC., a corporation,
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Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Pope & Talbot, Inc., respectfully shows:

This is a petition for a writ of certiorari to review a decision of the United States Circuit Court of Appeals for the Ninth Circuit reversing an interlocutory decree in admiralty causes arising out of a collision occurring in San Francisco Harbor.

Petitioner was the owner and operator of the American steamship Absaroka, severely damaged in collision with the American steamship Maui, owned and operated by Matson Navigation Company, the respondent here.

STATEMENT OF THE MATTER INVOLVED

On November 2, 1941, in the early morning, while it was still dark, the steamship Absaroka proceeded out of the Oakland Estuary into San Francisco Bay headed for sea. When off Yerba Buena Island and close to the San Francisco-Oakland Bay Bridge, she was struck by the Matson steamship Maui, a former passenger liner. Both vessels were severely damaged. Matson Navigation Company filed a libel in rem and in personam in the United States District Court for the Northern District of California, Southern Division, at San Francisco, seeking to recover the damages sustained to its vessel. A cross libel was filed by petitioner, Pope & Talbot, Inc., to recover for the damages which it sustained as a result of the collision.

The trial court found and held that the collision was due solely to faults of the Maui, and awarded a decree against Matson Navigation Company, the vessel's owner, awarding petitioner, Pope & Talbot, Inc., its full damages and dismissing Matson Navigation Company's libel.

Matson Navigation Company appealed from the decree to the United States Circuit Court of Appeals for the Ninth Circuit. That court reversed the decision of the trial court as to the responsibility for the collision, and concluded that the Absaroka, not the Maui, was solely at fault. A petition for rehearing filed by Pope and Talbot, Inc., was denied by the Circuit Court of Appeals.

JURISDICTION

The basis of the jurisdiction of this Court in this cause is Section 240 of the Judicial Code (28 U.S.C. Sec. 347) and Article III, Sec. 2, of the Constitution of the United States.

THE QUESTIONS PRESENTED

The case presents the following important question of maritime law, in which a review by this Honorable Court is respectfully requested:

> Is a privileged or hold-on vessel in a crossing situation under Article 21 of the Inland Rules (33 U.S.C. 206) required to navigate at a reasonable speed under existing circumstances, or is she privileged as to her rate of speed?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

1. Neither the Supreme Court, nor the lower Federal courts, have to date adequately defined the obligations of the privileged or hold-on vessel under Article 21 of the Inland Rules with respect to speed. The decision of the Circuit Court of Appeals for the Ninth Circuit in this case holds, in effect, that, in the absence of a statutory speed limit, there is no rule restricting the speed at which she may proceed, provided that her speed remains constant, as required by Article 21.

This question is of compelling importance in maritime law. We believe it should be settled for future guidance, not only of the Federal courts, but for seamen and navigators as well.

The trial judge found that the Maui was traveling at an excessive speed under the existing circumstances. In his opinion, entitled Memorandum and Order, he stated:

> "I find from the evidence that the Maui was clearly at fault in the following respects: * * * for proceeding at a speed of twelve knots an hour while it was still dark, in a zone where there was likely to be traffic, when she was about to pass under the bridge, and when she was in a position where her view of ships approaching on the course taken by the Absaroka was obscured. * * *" (R. 57)

The evidence of the speed, unquestionably high in a harbor, was undisputed. In its Findings of Fact and Conclusions of Law, the District Judge concluded:

> "That the following primary faults of the Maui were, and each of them is, adequate to account for said collision: (a) Proceeding at excessive speed under existing circumstances and conditions; * * *" (R. 91)

The Circuit Court of Appeals did not affirm the trial court's decree, nor modify it to mutual fault, but rejected the trial judge's findings in toto. The Circuit Court did not base its determination that there was no fault of excessive speed chargeable to the Maui upon a different finding of fact. The facts bearing on speed were not in conflict.

While we believe that the Circuit Court was in error on each point decided,[1] we believe the most vital error was in the approval of the Maui's speed. We think the point is not merely one of miscarriage of justice in this case, but one of significance in the interpretation of the Rules of the Road at Sea which were adopted in our law as a means of preventing collisions.

Experience shows, through the number of adjudicated decisions, that the crossing situation is one which fre-

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1. This is probably the only issue we may urge in this application for a writ under Rule 38(5) of the Rules of this Court.

quently results in disaster. The vessel on a crossing course with another vessel on her port hand is required, under the Rules of the Road, to hold her course and speed. The other vessel, which has the first on her starboard hand, is called upon to keep out of the way. Most navigational problems which occur in this situation have been settled by the Federal courts. Unfortunately, there has been no authoritative decision fixing the obligation of the privileged, or hold-on, vessel with respect to rate of speed. Some Federal courts, failing to recognize the problem, have treated the obligation of the hold-on vessel, under Article 21, to maintain course and speed as though it gives a privilege to the hold-on vessel of maintaining a high speed. See, for example, *The Chicago,* 125 F. 712 (C.C.A. 2, 1903). The present decision of the Circuit Court of Appeals for the Ninth Circuit is an outstanding example of this erroneous conception of the Crossing Rule. We know of no way in which the law can be properly clarified other than through a decision of this Court. As the law as presently interpreted, and as in this case established, is highly dangerous to life and property, we think that there is urgent reason for this Court to pass upon the issue.

The findings of the District Court determining that the Maui was proceeding at an excessive speed was fully supported by evidence uncontradicted in the record. The decision of the Circuit Court of Appeals upon this point appears in its opinion at pages 852-853 of the Record. It does not find a different speed or different circumstances to have existed. Its opinion is rested upon several fundamental misconceptions of the law on speed. These errors are dangerous, as they appear to extend a license to the careless seaman.

The first misconception is brought out in the statement:

> "The only speed limit applicable to vessels on San Francisco Bay is that of Article 16, Inland Rules (33 U.S.C.A. paragraph 192) which requires 'a moderate speed' in 'fog, mist, falling snow, or heavy rain storms'. * * *" (R. 852)

While it is true that there is no local ordinance or statute specifying the speed beyond which a vessel may not run in San Francisco Harbor, Article 29 of the Inland Rules, in effect, limits the speed of all vessels in all inland waters to a reasonable speed.[2] That rule states:

> "Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case." (33 U.S.C. 221)

The second fundamental misconception is in the Circuit Court of Appeals' belief that the Good Seamanship Rule, Article 29 above quoted, limits the speed of a vessel only where there are unusual or special circumstances present. The Court, in its opinion (R. 853) states:

> "There are no 'special circumstances' here within the meaning of Article 29 of the Inland Rules (33 U.S.C.A. paragraph 221) which would necessitate the Maui's varying her course or speed. * * *"

A vessel in a harbor, where traffic is to be expected, must always proceed at a reasonable rate, irrespective of whether there are any unusual or special circumstances present.

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2. Farwell, *The Rules of the Nautical Road*, p. 238.

The third fundamental misconception which appears in the Circuit Court's opinion is revealed by the following statement:

> "Furthermore, we cannot say the Maui's speed was reckless, for the collision would have been prevented by a speed faster than her twelve knots as well as by a slower speed. * * *" (R. 853)

To put this in other words, the Court states that a privileged vessel's speed will not be a fault if it appears that by a faster speed she would have escaped collision! This is the only test which the court applies to the Maui's speed.

If the law is that a privileged vessel may go at anything less than a *reckless speed,* then the standard imposed is a dangerous one. "Recklessness" is not synonymous with mere negligence, but is a standard comparable to gross negligence and willfulness.

> "It was held in Cole v. Blue Ridge Railway, 75 S.C. 156, 55 S.E. 126, quoting from Proctor v. Southern Railway Co., 61 S.C. 170, 39 S.E. 351, that negligence may be so gross as to amount to recklessness, but, when it does, it ceases to be mere negligence, and assumes very much the nature of willfulness; so much so that it has been more than once held in this case that a charge of reckless conduct will justify the jury, if the same be proved, in awarding punitive, vindictive, or exemplary damages."
>
> *Anderson et al. v. Atlantic Coast Line R. Co.,* 179 S.C. 367, 184 S.E. 164, 166, 104 A.L.R. 406.

Speed is the most frequent cause of collision on navigable waters as well as on land. The failure of the courts to interpret Article 29 of the Inland Rules to limit the speed

of the hold-on or privileged vessel as well as vessels in other collision situations has been unfortunate. We think it has caused many collisions and will continue to do so until the proper rule is laid down.

We submit that the only reasonable interpretation of the Rules of the Road in a crossing situation is that a privileged vessel, in harbor waters, is obligated to proceed at a reasonable speed *at all times* under the existing circumstances, and that if, at the time the Crossing Rule comes into operation and she is called upon to hold her course and speed, she is going at an unsafe speed, she is at fault if that speed contributes to the collision.

WHEREFORE, petitioner prays that the Court issue a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit directing it to send to this Court for review a full transcript of the record in the cause entitled "Matson Navigation Company, a corporation, Appellant, vs. Pope & Talbot, Inc., a corporation, Appellee," No. 10606 in the records of said court; that this Court review the said cause as to the aspects referred to in this petition; that the decision of the said Circuit Court of Appeals dated May 11, 1945, and its decree thereupon entered May 11, 1945, be reversed; that the decree of the District Court in said cause appealed from be affirmed, and that the petitioner have such other relief in the premises as may be just.

Dated July 9, 1945.

POPE & TALBOT, INC.,
Petitioner

By IRA S. LILLICK,
JOSEPH J. GEARY,
Proctors for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

Brief in Support of Petition for Writ of Certiorari

OPINIONS BELOW

The opinion of the District Court is not officially reported. The opinion, however, is reported in full in 1943 American Maritime Cases, page 1006.

The opinion of the Circuit Court of Appeals has not yet been officially reported. It was filed on May 11, 1945, amended by an order of May 19, 1945, and appears in the Record at pages 839 to 854. The decree thereon was entered May 11, 1945.

JURISDICTION OF THIS COURT

The jurisdiction of this Court is founded on Section 240 of the Judicial Code (28 U.S.C. Sec. 347) and Article III, Sec. 2, of the Constitution of the United States.

STATEMENT OF FACTS

The collision occurred at approximately 5:15 a. m. on November 2, 1941. At the time, it was dark. The Maui, a twin-screw vessel of 9,940 gross tons, 501 feet in length, and driven by turbine engines, was proceeding from Crockett to Hunters Point for dry docking (R. 135, 516). Proceeding at her half speed of about 12 knots, she sighted the lights of the tug Despatch No. 7, with the Barge No. 11 in tow, ahead of her and likewise proceeding in the general direction of the San Francisco-Oakland Bay Bridge (R. 522). The tug and tow, first seen to be crossing the Maui's course from port to starboard on a fine angle, shortly thereafter straightened up so as to be on a substantially parallel course. The Maui blew a two-blast whistle to the tug, indicating her intention to pass the tug on the latter's port hand (R. 522, 527). The Maui's course was then changed two to three degrees to the left (R. 527, 664), and she proceeded to attempt to overtake the tug and tow. No reply was heard to this whistle signal to the tug, but about a minute later a two-blast whistle signal was heard by the Maui from the tug, and her master said that he thought it was a reply to her signal (R. 576, 577). The Absaroka by this time was not in sight, as a view of her was shut out by Yerba Buena Island. This two-blast signal heard by the Maui was, in fact, blown by the tug to the Absaroka (R. 457, 458, 459). At this time, the

courses of the Maui and the tug were both toward the center of the span between Piers D and E of the San Francisco-Oakland Bay Bridge (R. 456, 527, 796). While still well astern of the tug she was attempting to overhaul, the Maui observed the lights (green, masthead and range) of the Absaroka bearing 2½ to 3½ points on the Maui's port bow (R. 528, 638, 797). The angle of approach to the course line of the Maui appeared to be about 60 degrees (R. 532, 638).

The Absaroka was a smaller cargo vessel, 430 feet long and having a tonnage of 5,695 gross tons. She was proceeding to sea (R. 135). She emerged from the Oakland creek or estuary about 5:02 a. m. and proceeded at a speed of nine knots or less (R. 225). On leaving the estuary, she shaped her course toward the span between Piers D and E of the San Francisco-Oakland Bay Bridge, keeping the green lights marking the center of the span a little open on her port bow (R. 226-7, 364-5). On this course, she passed 800 to 1,000 feet off the southerly shore of Yerba Buena Island where the lighthouse station is located (R. 184, 311). While some distance from the bridge, she picked up the colored and the towing lights of the Standard Oil Company's tug, Despatch No. 7 (R. 230).

The Maui was not then in sight, being hidden from her view by Yerba Buena Island. The tug blew two blasts of her whistle to the Absaroka, which indicated to the Absaroka that the tug intended to pass starboard to starboard (R. 230). The Absaroka accepted this proposal promptly by answering with two blasts (R. 230). The lights of the Despatch No. 7 then altered position so that only her green and white lights were visible on the Absaroka's starboard bow (R. 316).

A short time after making the passing agreement with the tug and tow, the red light and masthead and range lights of the Maui came into view to the Absaroka's right of the tug and bearing considerably broader (two or three points) on the Absaroka's starboard bow (R. 231, 276-277). The heading of the Maui could not immediately be made out (R. 308), but later she appeared to be altering her course somewhat to the left so that its projection would cross the course first of the Despatch No. 7 and then that of the Absaroka (R. 236).

The Absaroka and the Maui, when they sighted each other, were on what is known as the "crossing situation" under the Inland Rules, the Maui being what is familiarly called the privileged or hold-on vessel, and the Absaroka being the burdened or give-way vessel. This resulted from the fact that the vessels were on crossing courses, with the green light of the Absaroka opposed to the red light of the Maui, or, to put it in other terms, with the Maui on the starboard hand of the Absaroka.

When the Maui and Absaroka came into sight, the Maui sounded a blast which stuttered, and, fearing the Absaroka might think it a two-blast whistle, she blew a danger signal followed by one clear blast (R. 530, 541). The Absaroka answered the latter whistle immediately with one blast (R. 530). The two vessels were then 1½ to 2 miles apart (R. 540), the Maui proceeding at about 12 knots and the Absaroka at a speed of about 9 knots. The vessels, including the tug and tow which the Maui was attempting to overhaul, continued to approach each other for a period of from 2½ to 3 minutes. About 2¼ minutes before the collision, the Absaroka's bearing on the Maui's

port bow had broadened to about 4 points (R. 620, 647). At this time the master of the Maui believed he was *in extremis* and ordered his engines, which had previously been working at half speed and making 12 knots, to be put at full ahead (R. 534). He sounded one blast of the whistle, which the Absaroka answered with one (R. 534). He then went hard right on his rudder, and says that he put his starboard engine in reverse (R. 534). His deck bell book,[1] however (in conflict with the engine room bell book[2]), shows that he put his port engine in reverse. A danger signal followed by one blast was then blown by the Maui, the Absaroka answering the latter (R. 534-536, 541). The Maui then reversed both engines for a short time, following this by an order for full speed ahead on the starboard engine and a hard-left rudder (R. 534-536). The helmsman was not able to get the wheel over from hard right to hard left before the collision.

The Absaroka had stopped her engines within about a minute of sighting the Maui. She was slowing down as she passed Yerba Buena Island (R. 183).

A four-blast whistle followed by one from the Maui was heard, and the Absaroka answered the latter whistle (R. 235). The Absaroka then went full astern on her engines, hard right on her rudder (R. 319). As this maneuver was in violation of her agreed passing signal with the Despatch No. 7, she blew a four-blast danger signal to that vessel (R. 280). The tug had, however, already appreciated her own danger and had swung off her course at a right angle

1. Exhibit 4, R. 553; offered in evidence at R. 551.

2. Exhibit 1, R. 739; offered in evidence at R. 759.

in the direction of the San Francisco water front (R. 463). As the vessels approached more closely, the Maui's port side appeared to sweep down on the stem of the Absaroka (R. 286, 291). The bow of the Maui cleared the Absaroka, and a few seconds later the vessels came together, the Absaroka striking the Maui's port side while moving with slight headway (R. 285-6, 184). The collision occurred in the near vicinity of Pier E of the bridge (R. 186, 213). The place of collision was asserted by Maui witnesses to be under the center of the span between Piers D and E of the bridge. The angle of collision was 60 to 70 degrees (R. 546-7, 663).

Piland, the lighthouse keeper, was impressed by the Maui's speed. In his written report, sent in to his superior officer the day following the collision (see Appendix), he said that the vessel which turned out to be the Maui "hove into view, coming under the bridge at a good speed and collided with the outgoing ship." Noting the speed of the Maui as she continued after the collision, he further stated in his report:

> "The ships crashed together twice, the incoming ship kept her course and same rate of speed as though nothing at all had happened, just like a 'hit run driver'. * * * The incoming ship that was heading for Hunters Point was out of view before the outgoing ship had turned and headed for Pier 40 or thereabouts."[3]

In his oral testimony before the court, the lighthouse keeper, who had had experience as a seaman and navigator, testified to the Maui's speed.

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3. Maui Exhibit 13, R. 194-195. Offered in evidence, R. 195.

"The Court: What was it you said about the other vessel's speed?

A. She was going at a fast rate of speed, Your Honor." (R. 185)

He also told the court that the Maui heeled over to her right as she struck the Absaroka, which was another factor indicating great speed (R. 185, 198).

SPECIFICATION OF ASSIGNED ERROR INTENDED TO BE URGED

The error which we rely upon is that of the Circuit Court of Appeals in, while accepting the facts as to the Maui's speed, overturning the determination of the District Judge that such speed was excessive and was the cause of the collision.

SUMMARY OF ARGUMENT

The speed of the Maui was 12 knots, in the dark, in a part of San Francisco where traffic was to be expected and where vision was obscured by an island. Such a speed in a harbor has been condemned by the courts for virtually every situation except that of a vessel in the hold-on or privileged position under the Crossing Rule. There should be, and need be, no privilege in any vessel to go at a speed which, under the existing circumstances, endangers other vessels, whether the first vessel is a hold-on vessel or a burdened vessel under the Crossing Rule or a meeting vessel or an overtaken or overtaking vessel. The trial court's finding that the Maui was going at an excessive speed and that that speed contributed to the collision rested on undisputed facts and was correct in law.

ARGUMENT

The collision was brought about by the excessive speed of the Maui. As privileged vessel under the Crossing Rule, she was not privileged to go at an excessive speed.

The testimony is without contradiction that the Maui was proceeding at approximately 12 knots an hour until she commenced her asserted *extremis* maneuvers, the first of which was to increase her speed (R. 530, 704).

The Circuit Court of Appeals, reversing the trial court's finding of excessive speed, in effect held that the Maui was under no limitation as to speed (R. 852, 853) notwithstanding the fact that the Maui was proceeding in the dark in San Francisco Harbor, in a part of the bay where traffic was to be expected.

The crossing situation is the most hazardous one under the Rules of the Road.

> "According to the case books, about forty percent of faulty collisions are crossing cases. When we consider the nervous psychology nearly always present on one or both vessels in these cases, the wonder is that the collision rate is not higher. One is almost inclined to believe that the crossing situation should have a law against it."
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> Farwell, *The Rules of the Nautical Road,* p. 176.

It is manifestly of importance to seamen that the essential elements of this important rule be clearly defined. This was recognized by this Court in *Postal Steamship Corporation v. Steamship El Isleo, etc.,* 308 U.S. 378, when it passed upon the validity of Rules II and VII of the Board of Supervising Inspectors.

In the present case, the opinion of the Circuit Court of Appeals relieving the Maui from the consequences of her

excessive speed upon the assumption that she was not restricted by any rule as to her rate of speed presents an important question which has not been clarified by the Federal courts or passed upon by this Court.

The holding of the Circuit Court of Appeals that the speed of a privileged vessel is not limited by rule or law is, however, in conflict with the principles with respect to speed laid down by this Court.

> "In *The Europa,* it was said by the Privy Council:
>
> 'This may be safely laid down as a rule on all occasions, fog or clear, light or dark, that no steamer has a right to navigate at such a rate that it is impossible for her to prevent damage, taking all precaution at the moment she sees danger to be possible; and if she cannot do that without going less than five knots an hour, then she is bound to go at less than five knots an hour.'"
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> *The Pennsylvania v. Troop,* 19 Wall. 125, 86 U.S. 125, 22 L.ed. 148.

See also *The City of Paris,* 9 Wall. 634, 76 U.S. 634.

In *Postal Steamship Corporation v. Steamship El Isleo,* supra, this Court recently said (p. 387):

> "The so-called privileged vessel has no absolute right to keep her course and speed regardless of the danger involved in that action."

Farwell, in summarizing the Crossing Rule, states:

> "In accordance with the theory of privilege and burden the crossing situation requires, both in inland waters and on the high seas, that the vessel having the other to port maintain course and speed, and that the vessel having the other to starboard keep out of the way, avoid crossing ahead, and if necessary

slacken speed or stop or reverse. This arrangement creates a serious hazard when, as frequently happens, either vessel fails to do her duty."

Farwell, The Rules of the Nautical Road, pp. 192-193.

A serious hazard is *also* created when either the privileged vessel or the burdened vessel is navigating at an excessive speed when the crossing rule comes into operation; that is, when risk of collision first occurs.

If a speed of 12 knots was a safe speed when the Maui was farther up the bay, it was certainly not a safe speed when the Absaroka came into view as the Maui approached the San Francisco-Oakland Bay Bridge. Prior to the time when risk of collision between the Maui and the Absaroka first existed, the Maui had ample opportunity to check her speed. She did not do so, as the testimony of her own officers has shown. Her navigator chose to run at 12 knots, thinking to reduce her speed *after* she got clear of bridge traffic, instead of *before* she got into or clear of it (R. 684). Reasonable prudence, of course, would have dictated that she take into account the existing circumstances and reduce her speed before coming into traffic, and not after getting out of it.

The fact that in Article 16 of the Inland Rules[4] there is an express injunction to proceed at a moderate speed in the fog is no basis for assuming that, if there is no fog, a vessel's speed need not be limited. *Farwell, The Rules of the Nautical Road,* pp. 238, 239.

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4. "Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

The requirements of reasonable speed under clear weather conditions is covered by Article 29 of the Inland Rules, known as the Good Seamanship Rule.[5] The courts have found no difficulty in holding vessels at fault for excessive speed in clear weather in many situations:

> "One of the important applications of the rule of good seamanship as interpreted by the courts is in the restriction of speed. While moderate speed in foggy weather is a very definite requirement of the rules, they are silent on the subject of speed in clear weather. It is true that in most canals and in many rivers and harbors a specific speed limit is fixed by local statute or ordinance, and such a regulation has unquestionably the force of law. When a speed regulation exists, it invariably means speed over the ground and allowance must therefore be made when the rate is accelerated by a favorable current. *However, an examination of the cases shows numerous decisions holding vessels at fault for excessive speed in inland waters in the absence of any specific speed limit, these speeds ranging all the way from 4 to 17 knots.* It may be stated as a general rule that any speed in a harbor or narrow channel is excessive (1) if it causes damage to other property by the vessel's swell, or (2) if it renders the vessel herself unmanageable in maneuvering to avoid collision." (Italics ours)
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> *Farwell, The Rules of the Nautical Road,* pp. 238, 239.

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5. "Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Under Article 29, vessels have been held at fault by the Federal courts for excessive speed in clear weather in many different types of situations. The one notable exception is that of the speed of a privileged vessel in a crossing situation. The rules are all right, but the Federal courts, such as the Ninth Circuit Court of Appeals in this case, have misinterpreted them by failing to apply Article 29 to the hold-on vessel in the crossing situation.

It is no answer to say that, if the speed of the privileged vessel is too great, her obligation to hold course and speed is qualified by Article 27,[6] which excuses a vessel from strict obedience to the rules where special circumstances intervene. Article 27, in speaking of special circumstances, does not include within its scope circumstances in the nature of self-created danger, such as that produced by the Maui. Special circumstances are exceptional situations in the nature of an emergency rendering a departure from the rules necessary,[7] not ordinary anticipated harbor conditions, which make moderate speed necessary for general safety. The applicable rule is not Article 27, but Article 29.

In the case of *The Knoxville City*, 112 F.(2d) 223, the Ninth Circuit Court of Appeals held the Knoxville City solely at fault for a collision on the harbor side of the 1800-foot gap between the Los Angeles breakwaters. Before the collision, the Knoxville City had left her anchor-

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6. "Art. 27. In obeying and construing these rules due regard shall be had to all dangers of navigation and collision, and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

7. *The Rules of the Road at Sea*, La Boyteaux, p. 168.

age and proceeded at an admitted speed of 8 knots under circumstances where her lights might be obscured from other vessels, such as the Arkansan, by vessels at anchor and by the breakwater light. That collision was also in the early morning, under clear weather conditions. The court condemned the 8-knot speed.

While the Knoxville City was the burdened vessel on a crossing course, she might have met a vessel coming in the opposite direction in harbor traffic. It is difficult to see why her speed of 8 knots would have been any less of a hazard; that is, any less likely to contribute to the collision if the latter situation had materialized, and she had been a hold-on vessel under the Crossing Rule.

Notwithstanding its decision in *The Knoxville City*, under conditions which were not unlike those in the present case, the Circuit Court of Appeals reversed the trial court's findings in the present case that the Maui was going at an excessive speed, although her speed was 12 knots. The reason for the difference in the ruling was, not because of a different finding of fact, but, as indicated in the court's opinion, because of the belief of the court that the Maui was not restricted as to her speed. There is no wisdom in a rule holding that a vessel proceeding in a harbor where she is likely to encounter traffic will be found to be traveling at an excessive speed as to vessels which cross from her starboard hand, and not at an excessive speed as to vessels which cross from her port hand. She may be at one moment a hold-on vessel and at another a burdened vessel. The propriety of her speed is not to be judged by the unpredictable accident of whether another ship will cross from the left or from the right.

There is enough danger in the crossing situation without augmenting it by giving the hold-on vessel a privilege as to the rate of her speed. It seems hardly necessary to point out the reasons which should impel the privileged vessel to run at all times at a reasonable speed. In every other situation, on land and at sea, the connection between fast speed and a casualty has found clear recognition by the courts.

If a privileged vessel, proceeding in frequented parts of a harbor, is going at a safe speed, a burdened vessel which comes into view has more time and opportunity to get out of the way. When, as was the case with the Absaroka and Maui, the collision is at night, when the vessels can see each other only by their lights and it is difficult to judge distances, if the speed of the hold-on vessel is moderate, there is more time to watch the bearing of the lights and to determine the question as to whether the bearing is changing,[8] and additional time is afforded to the burdened vessel to take any maneuvers which may be required. If there are more than two vessels involved in the situation, as was the case here, because of the presence of the tug Despatch and her tow, this additional time may be vital.

The Absaroka was in a difficult predicament. Before sighting the Maui, she had exchanged whistles with the tug Despatch calling for a starboard-to-starboard passage.

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8. This is a means of determining whether risk of collision continues to exist.

Note to Article 17, Inland Rules (33 U.S.C. 201): "Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist."

She therefore could not change her course to the right without running the risk of striking the tug and tow. She could in no event make a decided swing to the right because of the presence of Yerba Buena Island close on her starboard hand. There was no way in which the Absaroka could determine whether the Maui would first pass ahead of her to her left, or whether the tug would first pass on her right, as these approaching vessels could be seen only as lights ahead of her. The Absaroka had the right to assume that the Maui was proceeding at a safe speed. She also had the right to assume that the Maui and the tug Despatch had agreed upon a passage between them as required by the Overtaking Rule.[9] If such a passage was not safe, it was the obligation of the tug to refuse consent to the passage by blowing a danger whistle. The testimony is uncontradicted that the tug never agreed to the Maui's overtaking maneuver.

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9. Article 18, Rule VIII, 33 U.S.C. Sec. 203, Subd. VIII, which provides:

> "When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam whistle as a signal of such desire, and if the vessel ahead answers with two blasts, shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals."

In these circumstances, the Absaroka had the right to anticipate that she could pass the Maui and the tug one at a time. She therefore slowed down and waited. The fact that she was not seen promptly to turn to her right alarmed the master of the Maui and he, some 2¼ minutes before the collision, not yet clear of the tug and tow, commenced his *extremis* maneuvers.

Under these admitted conditions, the collision was brought about. It is evident that had the Maui been proceeding at a reasonable speed, there would have been ample time and opportunity to avoid the collision. Coming into view of the Absaroka at a speed of 12 knots, with the obstacle of overtaking and getting clear of the tug and tow before she got to the bridge, the Maui was in a predicament. Had she been going at a safe speed, it would have been easy for her to turn under the stern of the tug and tow or to hold back until she could see what the Absaroka was able to do. Instead, when approximately one-third of a nautical mile from the Absaroka, she undertook the asserted *extremis* maneuvers, which brought about the collision. The departure from her course at that distance was the result, not of the Absaroka's inaction, but of the Maui's own excessive speed.

A navigator with a liking for speed, such as the master of the Maui, will find comfort and assurance in a decision that he can, with impunity, go at a rapid rate down through the San Francisco Bridge, knowing that any traffic which comes out from behind the Island, from Oakland or Alameda, will be caught in the position of burdened vessels and obliged, at their peril, to keep out of the way.

CONCLUSION

Maintaining course and speed under the injunction of Article 21, when the speed is excessive, is not adherence to the Rules of the Road. Article 29 requires that at the time Article 21 comes into operation, the vessel in the hold-on or privileged position be proceeding at a moderate or reasonable speed in view of the existing conditions and the traffic to be anticipated. Whenever a steamer proceeds into waters where the frequent passing of vessels may be expected or where known difficulties render a high rate of speed dangerous, prudence requires her to go at a rate commensurate with the attending dangers. The Maui did not do so, but relied upon an assumed privilege as to her rate of speed, in which she was supported by the Circuit Court of Appeals.

Respectfully submitted,

IRA S. LILLICK,
JOSEPH J. GEARY,
Proctors for Petitioner,
Pope & Talbot, Inc.

(APPENDIX FOLLOWS)

APPENDIX

"From: Piland, Wayne R., Assistant Keeper, Yerba Buena Light Station.

"To: Commander San Francisco District.

"Subject: Collision of ships, report of:

"1. On Sunday morning, 2 November, 1941, at about 5:15 a. m. my wife and I witnessed the collision of two ships just under the Bay Bridge.

"2. My attention was called by an outgoing ship blowing one very loud blast at intervals while passing this station and headed for the Bay Bridge. I noticed that his repeated whistle was not being answered and was watching to see just what the outgoing ship was whistling at. My wife being awakened by these very loud whistles joined me to find out what it was all about. The outgoing ship was slowing as she was approaching the bridge and blowing one blast, and was stopped as she nosed under the bridge, then she blew one blast, followed by four, and then for the first time we heard another ship answer, it blew one blast and hove into view coming under the bridge at a good speed and collided with the outgoing ship. The ships crashed together twice, the incoming ship kept her course and same rate of speed as though nothing at all had happened just like a 'hit run driver.'

"3. I telephoned the Coast Guard (Yukon 0626) and reported a collision giving the facts.

"4. The outgoing ship that had been stopped started slowly backing and turning to the south and appeared to be drifting for a while. The incoming ship that was heading for Hunters Point was out of view before the outgoing ship had turned and headed for Pier 40 or thereabouts.

"5. At 5:40 a. m. I again called the office, reporting where the ships had gone, and described the collision more fully.

"6. Visibility was excellent. No fog or haze was seen for hours before or after the accident.

WAYNE R. PILAND."

[Maui Exhibit 13, Apostles 194-195. Offered in evidence, R. 195.]

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AUG 31 1945
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CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation,
Petitioner,

vs.

MATSON NAVIGATION COMPANY,
a corporation,
Respondent.

No. 247

Brief in Opposition to Petition for Writ of Certiorari

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In the Supreme Court of the United States

OCTOBER TERM, 1945

POPE & TALBOT, INC., a corporation, *Petitioner,* vs. MATSON NAVIGATION COMPANY, a corporation, *Respondent.*	No. 247

Brief in Opposition to Petition for Writ of Certiorari

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The respondent, Matson Navigation Company, owner of the SS Maui, presents this, its brief, opposing the petition for certiorari herein.

I.

THE PETITION PRESENTS NO QUESTION OF LAW FOR REVIEW

The petition merely seeks a review of facts unanimously determined against the petitioner in the Court below.

There is no real issue of law presented, much less any "*important* question of maritime law", as asserted by petitioner. Such an issue cannot be created by the petitioner's assertion that the Circuit Court of Appeals herein has established as a rule of law that a privileged vessel may travel at any rate of speed she chooses. There is nothing in the opinion to warrant such an assertion.

The Circuit Court of Appeals in a full and well considered opinion, unanimously held that the speed of the Maui was not excessive under the existing circumstances and conditions, *after* having noted the following undisputed facts and rules:

1. "The facts show that the vessels sighted each other approximately five minutes before the collision. At that time they were more than a mile apart." (Opinion, R. 847.)[1]

2. "There was, then, ample opportunity for the taking of *any*[2] steps necessary to effect a safe passage." (Opinion, R. 847.)

3. The Maui and the Absaroka promptly on sighting "exchanged one-blast signals thereby entering into a passing agreement in accordance with the rules, an agreement that the Maui would cross the bow of the Absaroka and that the Absaroka would cross the stern of the Maui." (Opinion, R. 847.)

4. "In the face of her duty under the Inland and Pilot Rules and of her *whistle agreement* the Absaroka main-

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1. The Opinion appears in the Record, pp. 840-854 and is now reported in 149 F.2d (adv.) 295.

2. Emphasis supplied throughout this brief.

tained her speed at full ahead, nine knots, until at least two minutes before the collision, when her engines were stopped." (Opinion, R. 847-8.)

5. The Absaroka "maintained her course until approximately a half minute before the collision, when the wheel was put hard right and the engines reversed." (Opinion, R. 848.)

6. The Absaroka "still had headway at the time of the impact." (Opinion, R. 848.) "*She* struck the *forward* port side of the Maui at an angle from ahead of about 70° or 80°." (Opinion, R. 843-4.)

7. "The rules direct that a burdened vessel keep out of the way by directing her course to starboard so as to cross the stern of the other vessel or by slackening her speed, stopping or reversing. The Absaroka ignored their commands until too late to avoid disaster. She disregarded her duty as the burdened vessel and thereby violated Articles 19, 22 and 23 of the Inland Rules and Pilot Rule VII." (Opinion, R. 848.)

The case is a simple one, and the petition calls for reply only because of its effort to distort the holding of the Circuit Court with respect to the matter of the Maui's speed. The vessels sighted each other when they were over a mile apart. They were on crossing courses. By exchange of one-blast signals, they agreed that the Absaroka would pass under the stern of the Maui. The Absaroka flagrantly violated this undertaking and her statutory duty as the burdened vessel and thus brought about the collision. In response to the claim (the only one now urged) that the Maui's half speed of twelve knots was excessive, the Circuit Court held: (1) that such speed was not excessive or

in violation of any statutory rule and (2) that the speed of the Maui was not a proximate cause of the collision. Petitioner disputes neither of these conclusions, but in its frantic search for a point of law which may be attacked, asserts that the Circuit Court held that a privileged vessel is under no duty to proceed at reasonable speed. The opinion of the Circuit Court is not susceptible of any such interpretation.

Thus the petition and its brief ignore the facts stated above, ignore the opinion as a whole and attempt, by pulling three sentences from their context (Petition, pp. 6-7), to show that the Circuit Court of Appeals has established a rule that will lead vessels to travel at dangerous speeds. In effect, they are asking this Court to grant a writ to determine that a speed of 12 knots on San Francisco Bay is excessive as a matter of law even though the facts be that the "visibility was excellent"; that the vessels sighted each other when more than a mile apart with ample time to take any action to avoid collision; and that one-blast whistles were exchanged promptly by which the burdened vessel (Absaroka) agreed that she would keep out of the way of the privileged vessel (Maui).

Any such *fixed* rule on speed by reference to a certain number of knots would have to come from statutory enactment by the Congress or local legislative body.[3] There is no such rule for the waters in question which is not without significance that the dangers which petitioner attempts to conjure are non-existent.

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3. Petitioner apparently recognizes that local statute or ordinance could establish a fixed speed limit. See quotation, Brief, p. 19, from Farwell, The Rules of the Nautical Road, 238-239.

Petitioner is forced to rely on counsel's own statement that the Maui's speed was excessive. Piland, the assistant lighthouse keeper, who was a half mile or more from the collision, had only recently arrived in San Francisco and who some time before entering the lighthouse service may have stood at the helm of a Navy vessel, could scarcely be classified as an expert qualified to testify as to reasonable and safe speeds on San Francisco Bay. He even thought that there was a law against a privileged vessel maintaining course and speed (R. 201), yet petitioner's brief (p. 14) describes him as having been a "navigator" in a vain effort to give some value to his comment that the Maui's speed was "good" or that it was "fast."

Furthermore, and more noteworthy, there was not a single witness from the Absaroka who contended that the Maui's speed was excessive. As a matter of fact, Captain Prendle, the Absaroka's master contended that the Maui *stopped* her headway through the water (R. 242) and then "swept down in a sidewise motion * * *. She swooped on the Absaroka at a right angle." (R. 286.)[4]

Under the headings "Statement of Facts" and "Argument" in petitioner's brief an apparent effort is made to suggest questions that are not involved in the single issue of the Maui's speed, which issue the petitioner *expressly* states to be the *sole* issue under the petition. The "facts"

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4. That was his testimony in his deposition, although earlier and just two days after the collision he had testified before the C Marine Investigation Board that there was a *flood* tide at the time and that this flood tide set the Maui down on the Absaroka. (R. 253) This was either fabrication or gross ignorance since it was established that the tide was *ebbing* and not flooding. (R. 151) *At no time did he claim that the Maui's speed confused him or brought about the collision.*

narrated in the petitioner's brief give only a fragmentary and distorted picture of the case. Some are distinctly misleading. For example, petitioner (Brief, p. 13) states "the Absaroka had stopped her engines within about a minute of sighting the Maui." The fact is that the Absaroka did not stop her engines until a minute and a half before the collision, as shown by her engine room bell book. (Absaroka Exhibit 1, Johnson, R. 337, offered in evidence R. 217.) Since the vessels sighted each other when more than five minutes apart, this necessarily means that the Absaroka continued at full ahead for at least 3½ minutes after sighting the Maui and blowing one blast in reply to the Maui's one blast signal. This is quite different from the statement by the petitioner that the Absaroka stopped her engines within about a minute after sighting the Maui.

It is not appropriate here to burden the Court with a detailed statement of the facts of the case, since the controlling facts are fully set forth in the Opinion of the Circuit Court of Appeals. Petitioner has chosen to attach as an appendix to its brief the report of the assistant lighthouse keeper, which in no way controverts the essential facts of the case. It is interesting to note that this witness did not know that the Maui and the Absaroka had exchanged one-blast signals immediately after sighting each other and, accordingly, he did not know that the Absaroka had entered into a whistle agreement to keep clear. Furthermore, this report confirms the testimony of the other witnesses in stating "visibility was excellent. No fog or haze was seen for hours before or after the accident."

Petitioner makes no reference to the fact that the Absaroka's own log account of the collision is completely blind

on any of the facts. We attach as an appendix a columnar comparison of the log book account of the collision from the two vessels so that the Court may readily contrast the meaningless statement in the Absaroka's log with the full statement in the Maui's log.[5]

The Absaroka's log account left her master wide open to adopt any theory he might later have as to the cause of the collision. As noted above (footnote 4, p. 5), before the C Board he blamed a non-existent flood tide; in his deposition he discounted the tide and blamed the Maui *not* for her headway or speed but for *stopping* and moving sidewise on him; and now *counsel* claims that the Maui's half speed of 12 knots was excessive and the primary cause of the collision.

II.

THE MAUI'S SPEED WAS REASONABLE CASES CITED BY THE PETITIONER DISCUSSED

There is no basis for suggesting that a 12 knot vessel is a high speed vessel. The Maui's top speed was 16 knots at full ahead, but it is established that long before the vessels sighted each other the Maui was travelling at reduced speed, i.e., half speed on her engines, giving her a speed of about 12 knots. This obviously gave her a greater

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5. The Maui's log was written up by the mate on watch without assistance within a few hours after the collision while she was at anchor in the Bay and there was danger of her capsizing as a result of the collision damage. The Absaroka was in no danger and docked safely within two hours after the collision with ample opportunity to have prepared a full account of the collision and to have stated, if true, any of the faults later alleged against the Maui.

reserve of backing power and further demonstrates the reasonableness of her speed.

The Absaroka was travelling at her full speed of about 9 knots. We do not suggest that there was any fault of the Absaroka in thus going as fast as she could. Even though her speed had been much greater there was still no danger, *if* she had obeyed her duty as the burdened vessel and with even reasonable promptness turned to the right, stopped or reversed her engines. It was not the speed of either vessel at the time that they sighted each other and exchanged signals which caused the collision. It was the Absaroka's failure to take any action at all for at least 3½ minutes thereafter which was the sole cause of the collision.

If the Absaroka's master were in the predicament claimed in the petition and brief, then why did he immediately answer the Maui with one blast? If he felt that the Absaroka was in any way embarrassed by the tug with its tow or his prior exchange of signals with tug, then it would have been a simple thing for the Absaroka to have answered the Maui's one-blast signal with the danger signal of four or more short blasts. The Absaroka would thus have given some indication to the Maui of the Absaroka's intention not to pass under the stern of the Maui. The Maui was then well astern of the tug and tow, and there was ample opportunity for her to act under the special circumstances which would have been created by a danger signal from the Absaroka. Captain Heuer of the Maui testified as follows:

> "Q. Captain, approximately how far astern of the tug and tow was the Maui at the time you ex-

changed your first one-blast signals with the Absaroka?

A. About a quarter of a mile.

Q. At that time, Captain, if the Absaroka had, instead of answering your one-blast signal, blown four blasts, could you have taken any steps to have either gone to the right or gone astern and avoid the collision?

A. Yes." (R. 609.)

The Maui had no way of knowing that the Absaroka was going to violate her *agreed* duty until the secret intentions of the Absaroka to cross the bow of the tug had placed the Maui in the jaws of collision. The Absaroka was *signalling* her intention to do one thing and was actually doing another.

The statement appearing on page 24 of the petitioner's brief that "the Absaroka had the *right* (sic) to anticipate that she could pass the Maui and the tug *one at a time*" is quite amazing. The Absaroka was at all times to the *left* of the Maui. The tug was to the *right* of the Maui on a parallel course to the Maui and hence the tug's course line was more distant from the Absaroka than the Maui's course line. It would have been physically impossible for the Absaroka *first* to have crossed ahead of the tug and *then* to have passed under the stern of the Maui since she would already have crossed ahead of the Maui. If she expected to pass under the stern of the Maui *first* and *then* to cross ahead of the tug, such a maneuver would have been possible only if the Maui had been going at greater than her half speed.

Perhaps the Absaroka's master guessed that the Maui's speed was greater and gambled on a close shave to get

under the stern of the Maui and then to rush across the bow of the tug. Such a close shave gambling has been repeatedly condemned by the Courts. See *The Richmond* (D.C. Va.), 150 F. 193 at 194-5. In any event it is amazing that the petitioner urges that the Maui should have gone more slowly to permit the Absaroka to accomplish a maneuver which we see could have succeeded only if the Maui had been going *faster*.

The petitioner cites a total of six cases. One of these cases was a fog collision where the crossing signal rules do not apply;[6] one was a collision between a steamer and sailing vessel as to which the steamer was the burdened vessel and the steamer was held solely at fault;[7] three were crossing cases, in two[8] of which the burdened vessel was held solely at fault and in one[9] of which the

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6. *Pennsylvania, The v. Troop*, 19 Wall. 125, 86 U.S. 125, 22 L.Ed. 148. The quotation from this case in the petition is actually from an opinion of the Privy Council in The Europa. There is apparently no extant report of the opinion of the Privy Council although the report in the Admiralty Court below, 14 Jurist 627, shows that it was a fog collision where the responsible vessel was not condemned for *speed* as such but for her speed of 12½ knots in a dense fog without a special lookout and without sufficient power at her wheel to turn promptly. It has long been established in this country that even in fog cases there is no fixed speed but that the reasonableness of the speed must be determined by the facts of each particular case, such as extent of visibility, stopping ability and vigilance of lookout. *McCready v. Goldsmith*, 18 How. 89, 59 U.S. 89.

7. *City of Paris*, 9 Wall. 634, 76 U.S. 634.

8. *The Chicago*, 125 F. 712 (C.C.A. 2); *The Knoxville City*, 112 F.2d 223 (C.C.A. 9).

9. *Postal S.S. Corp. v. S.S. Isleo*, 308 U.S. 378. In this case the Court did not hold the privileged vessel at fault but merely upheld the validity of Pilot Rules II and VII in prohibiting cross signals. For the final decision on the merits see 112 F.2d 297. There was no cross signalling between the Maui and the Absaroka, hence the Maui had no advance notice that Absaroka would violate the rules.

privileged vessel was held jointly at fault, not for speed but for *continuance* of course and speed *after* the burdened vessel had blown two blasts indicating that she intended to cross ahead. The sixth case was not even an admiralty matter but involved a question of punitive damages for setting a fire on a windy day on a railroad.[10]

The petitioner contends that an important question of maritime law is involved. However, the petitioner has not quoted from a single case even suggesting that any such problem exists, either as a matter of law or practical navigation, under the rules of the road, rules which have been in force in substantially their present form for approximately half a century. Surely the innumerable reported collision cases would have discussed this problem if it existed. Surely, also, some text writer would have discovered it. Petitioner's brief (pp. 16, 19) quotes at some length from the most recent textbook on collision law, Farwell, The Rules of the Nautical Road, but the petitioner's "question" is not covered.

We submit that the petitioner's "question" is not considered in any case or in any text because it has no basis. No one apparently has, heretofore, had the temerity to urge that there is an important and undecided question of law presented in a decision such as the instant one; a decision which holds that the glaring faults of the burdened vessel are adequate to account for the collision and which refuses to shift any part of the responsibility to the privileged vessel for a speed of only three knots more than the burdened vessel where the vessels sighted and sig-

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10. *Anderson v. Atlantic Coast Line R. Co.*, 179 S.C. 367, 184 S.E. 164, 104 A.L.R. 406.

nalled a safe distance apart with ample opportunity for the burdened vessel to obey her agreed duty.

Petitioner's argument in effect is that the speed of the privileged vessel in a crossing situation will be excessive wherever by hindsight it can be said that if she had been going more slowly the collision would not have occurred, in other words, that the Absaroka might have been able to get away with crossing the Maui's bow in violation of the rules and her whistle agreement. This argument has been rejected by the Courts.

In *The Fred B. Dalzell, Jr.* (C.C.A. 2), 45 F.2d 580, which involved crossing vessels in New York Harbor, the burdened vessel, the Moran, was held solely at fault for failure to keep clear. The privileged Dalzell was going 11 knots, but in refusing to hold her speed excessive the Court said:

> "Some suggestion has been made that, had her speed been less, she would have had time to stop, even after the Moran signalled, and allow her to clear. This is doubtless so. *But she was certainly under no duty to so regulate her speed that she could stop in safety for the Moran to pass ahead whenever and however late that burdened vessel saw fit to notify her that she was about to risk collision in so doing in violation of the starboard hand rule.* See *The Chicago* (C.C.A.) 125 F. 712, 716. We see no justification for the charge that the Dalzell tug stubbornly held on into collision, however well that does characterize the conduct of the Moran. The latter tug's insistence upon crossing ahead when she should have gone behind wrongfully put both vessels into positions where danger of collision was imminent. In the absence of clear proof that the privileged vessel,

then acting in extremis, was at fault in failing to avert the collision in spite of the conduct of the wrongdoer, we think the vessel which took the chance, violated the rule, and created the danger, is wholly responsible for the result." (p. 581)

The Absaroka's fault is even more aggravated than the burdened vessel in the above case which had blown two blasts to the privileged vessel, indicating that she would attempt to cross the privileged vessel's bow. The Absaroka misled the Maui by repeatedly blowing one blast, leaving it for the Maui to divine the Absaroka's contrary intention.

In the case of *The Lexington* (C.C.A. 2), 275 F. 279, involving crossing vessels at night in the waters of Narragansett Bay, the burdened vessel was held solely at fault for failure to avoid crossing the privileged vessel's bow. *The privileged vessel was making a speed of 14 to 15 miles per hour.* Apparently there was no argument that the speed of the privileged vessel was excessive, since the vessels sighted each other when about a mile apart and there was ample opportunity for the burdened vessel to keep clear, just as there was for the Absaroka in the instant case.

CONCLUSION

The whole case is one of flagrant fault of the Absaroka as the burdened vessel which wholly failed in her statutory duty to keep out of the way of the Maui. The unanimous decision of the Circuit Court of Appeals is without error. There is no issue of law involved which calls for any review by this Honorable Court. The petition is without merit and should be denied.

Respectfully submitted,

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San Francisco, Calif.,

Proctors for Respondent.

(APPENDIX FOLLOWS)

Appendix

COMPARISON OF ABSAROKA AND MAUI LOG BOOK ACCOUNTS OF COLLISION

ABSAROKA	MAUI
"While proceeding to sea from Oakland Calif. vessel collided with the Matson Steamer Maui, off Yerba Buena Isl. Upon ascertaining damage vessel proceeded to Pier #40." (Absaroka Exhibit No. 5, R. 222, offered in evidence R. 213.)	"Sunday morning Nov. 2nd, 1941 while proceeding from C.&H. Ref. Crockett to Hunter's Point Drydock, Capt. H. W. Heuer Master conning, A. W. McWhorter Relief Mate on bridge assisting Master, A.B. A. Tamman at wheel and A.B. N. Johansen on lookout; This vessel when approximately under S. F. Bay Bridge between piers D & E was struck on the port side about thirty feet aft of the bridge by the bow of a vessel reported to be the McCormick Steamer Absaroka. Said steamer was proceeding in a direction across our course apparently from Oakland or Alameda and approaching on our port hand. A few minutes before the collision and before above mentioned vessel was sighted due to the fact that view of it was shut out by Yerba Buena Island, a two blast whistle signal was given to a tow which was ahead and slightly on our stb bow to signify our intention to pass them on our stb hand. The tow hauled over and shortly after we sighted the crossing vessel. One blast was blown with the intention of passing her on our port hand. Said vessel answered with one blast however kept on her course. The danger signal was blown first by this vessel and followed by one short blast. The approaching vessel answered with one blast but continued on her course, the danger signal was blown by this vessel again and the engines maneuvered as recorded in bellbook and right hand page of log book, to avoid collision. At 5:15½ A.M. our engines were stopped. After a quick inspection it was ascertained that our port deep tank was stove in and a large hole stove in #2 hold, through which we were taking considerable water. Both port boats were smashed and the side and rails damaged for a long distance aft, the other vessel having struck us again with considerable force well aft. The vessel believed to be the Absaroka appeared to be in no danger. We proceeded under a slow bell and anchored off Hunters Point at 6:43 A.M." (Absaroka Exhibit No. 4, Heuer, R. 597, offered in evidence R. 149).

Due service and receipt of a copy of the within is hereby admitted this.....day of August, 1945.

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Proctors for Petitioner